FILED

MAY 04 2006

Carol E. Higbee, P.J.Cv.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 343-2190

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE:	**Fullman v. Hoffmann-La Roche, Inc., et al**
DOCKET #:	**ATL-L-4034-04**
DATE:	**April 28, 2006**
MOTION:	**Defendant's Motion to Dismiss the Complaint with Prejudice**
ATTORNEYS:	**Diane E. Lifton – Defendants** **John P. Kopesky - Plaintiffs**

Having carefully reviewed the papers submitted and oral arguments presented, I have ruled on the above Motion as follows:

Defendants Hoffmann-La Roche, Inc. and Roche Laboratories, Inc. (collectively "domestic defendants") bring this motion to dismiss plaintiff Tamara Fullman's complaint with prejudice for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). Defendants allege that plaintiff's complaint is barred by the applicable statute of limitations. Plaintiff opposes this motion.

BACKGROUND

Accutane® was first developed in 1971 and is manufactured and distributed in the United States by defendants. In 1982, the FDA approved Accutane® for treatment of severe cystic acne that is unresponsive to other treatments.

Plaintiff began taking Accutane® on September 14, 1994 for the treatment of acne and lesions of the face. Plaintiff took Accutane® as prescribed by her doctor until April 27, 2001. During that time, plaintiff alleges that she suffered from depression.

On April 19, 2001, plaintiff went to Chestnut Hill Hospital after suffering from abdominal pain. Plaintiff was admitted with a diagnosis of acute pancreatitis with mild hepatitis and remained in the hospital for nineteen days. When plaintiff was discharged, her diagnosis was acute pancreatitis, likely secondary to Accutane® or possibly hypertriglyceridemia, and occult diabetes mellitus. Plaintiff's blood sugar eventually returned to normal and she required no further treatment for diabetes mellitus or pancreatitis when she was discharged.

On March 15, 2002, plaintiff delivered a still born baby at twenty-two weeks of gestation. She alleges that her pregnancy was complicated by abdominal problems.

On June 30, 2004, plaintiff went to Abington Memorial Hospital after suffering from abdominal pain. She was admitted until July 7, 2004. Plaintiff claims there was a dramatic change in her physical condition at this time. When plaintiff was discharged, her diagnosis was acute pancreatitis and diabetes. Plaintiff alleges that since that time she has suffered from severe and chronic pancreatitis, bowel pain and cramping, constipation, gastroesophageal reflux disease, stomach cramping, fatigue, anemia, diabetes, discomfort, physical and emotional suffering.

On December 16, 2004, plaintiff filed a complaint with the Superior Court of New Jersey, Atlantic County, Law Division, seeking to recover for injuries she allegedly suffered as a

result of ingesting Accutane®. Plaintiff's complaint consists of nine counts: (1) defective design and manufacture under the New Jersey Products Liability Act ("NJPLA"); (2) failure to warn under the NJPLA; (3) consumer fraud violation under the New Jersey Consumer Fraud Act ("NJCFA"); (4) fraud under the NJCFA; (5) breach of implied warranty of merchantability under the NJPLA; (6) breach of warranty of fitness for a particular purpose; (7) breach of express warranty under the NJPLA; (8) negligent design and manufacture; and (9) punitive damages under the common law and NJPLA.

Domestic defendants have filed this motion asserting that, pursuant to R. 4:6-2(e), plaintiff's claims are barred in their entirety by the applicable two-year statute of limitations. Defendants argue that Pennsylvania rather than New Jersey law may apply because plaintiff is a Pennsylvania resident. However, defendants assert that plaintiff's claims are barred under the law of either state because both states have a two-year statute of limitations for causes of action alleging personal injury. At this point in this case, a conflict of law analysis is not pertinent because, as defendant correctly states, both New Jersey and Pennsylvania have two-year statute of limitations for personal injury suits. As discussed below, both New Jersey and Pennsylvania also apply a form of the "discovery rule."

According to defendants, plaintiff filed her complaint outside the two-year statute of limitations. Defendants argue that plaintiff can not rely on the "discovery rule" to support the late filing of her complaint because the "discovery rule" does not apply when a plaintiff knew, or should have known, that a basis for a claim existed more than two years before the complaint was filed. According to defendants, plaintiff can not claim that she was unaware of a potential claim against defendants until after her June 2004 hospital admission because she was made aware that her alleged injuries may have resulted from taking Accutane® in May of 2001 when

she was dismissed from Chestnut Hill Hospital with a diagnosis of acute pancreatitis, likely secondary to Accutane.® Defendants also allege that plaintiff was made aware that her alleged injuries may have resulted from taking Accutane® after she delivered a still-born baby in March of 2002.

Plaintiff claims that defendants', "affirmative misrepresentations and omissions actively concealed from Plaintiff, the medical community and the general public the true risks associated with the ingestion of Accutane®," which tolls the statute of limitations. Defendants argue that fraudulent concealment only tolls the statute of limitations when there is an affirmative and independent act of concealment that misleads the plaintiff from discovering her injuries.

Plaintiff further argues that her claims are not barred under the statute of limitations because her claim falls within the "discovery rule." Plaintiff alleges she was not aware of the connection to Accutane®. According to plaintiff, even if she was aware two years prior to the filing of her complaint that there was a possible relationship between her April 2001 episode of pancreatitis and her ingestion of Accutane® does not mean that she had knowledge of an actionable claim against defendants for negligent testing or for the failure to warn of a known hazard. Plaintiff asserts that questions of fact still exist as to the time plaintiff discovered that she had an actionable claim against defendants.

In the alternative, plaintiff argues that where a defendant's negligence increases the risk of harm but the harm has not yet occurred, a cause of action does not begin to accrue against the defendant until the harm actually occurs. According to plaintiff, her use of Accutane® placed her at an unacceptable increased risk that she would develop severe chronic pancreatitis and other gastrointestinal problem and diabetes, but she did not in fact develop chronic severe pancreatitis and other problems until June of 2004.

Plaintiff also argues that the statute of limitations is equitable in nature. Thus, a defendant must demonstrate some prejudice due to lack of notice for a case to be dismissed on statute of limitations grounds. Plaintiff asserts that in this case there has been no prejudice because defendants have been fully aware of litigation involving Accutane® for a significant period of time.

ANALYSIS

R. 4:6-2(e) allows a party to bring a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a motion is based on the pleadings and if matters outside the pleadings are considered, the motion is to be treated as one for summery judgment. R. 4:5-2 provides that a pleading that asserts a claim for relief must contain a statement of the facts that the claim is based upon showing that the pleader is entitled to relief and a demand for judgment for the relief being sought. R. 4:5-7 provides that "[e]ach allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required. Additionally, all pleadings shall be liberally construed in the interests of justice.

On a motion under R. 4:6-2(e), the complaint is to be thoroughly and liberally searched in order to determine if a cause of action can be garnered from the document, even if it is contained in an obscure statement, and an opportunity to amend should be given if necessary. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). This is especially so if the litigation is in its early stages with further discovery yet to be taken. Id. On a motion to dismiss, the plaintiff is accorded every reasonable inference and the motion "should be granted only in rare instances and ordinarily without prejudice. As such, 'if a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.'" Smith v SBC

Communications Inc., 178 N.J. 265, 282 (2004) (quoting F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

Pursuant to N.J.S.A. 2A:14-2, the statute of limitations in a personal injury matter is two years after the cause of action has accrued. Baird v. American Medical Optics, et al., 155 N.J. 54, 65 (1998). Under Pennsylvania law, "an action to recover damages for injuries to the person" must be commenced within two years. 42 Pa.C.S.A. 5524(2); Fine v. Checcio, 582 Pa. 253, 260 (2005).

However, the so-called "discovery rule" provides relief from a strict application of the statute of limitations. Baird, supra, 155 N.J. at 65; Fine, supra, 582 Pa. at 266-67. The "discovery rule" is a rule of equity used to mitigate "the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law." Lopez v. Swyer, 62 N.J. 267, 273-74 (1973); Baird, supra.

The "discovery rule" provides that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez, supra, 62 N.J. at 272. Under Pennsylvania law, the "discovery rule" arises "from the inability of the injured, despite the exercise of due diligence, to know of the injury or its cause." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 85 (1983); Fine, supra, 582 Pa. at 267. The "discovery rule" requires that a plaintiff have knowledge of both her injury and that the injury is the fault of another. Guichardo v. Rubinfeld, et al., 177 N.J. 45, 51 (2001) (citing Martinez v. Cooper Hosp.-Univ. Med. Ctr., 163 N.J. 45, 52 (2000)); Fine, supra, 582 Pa. at 268 (citing Crouse v. Cyclops Industries, et al., 560 Pa. 394, 404 (2000)).

Under New Jersey law, the court must determine whether the "discovery rule" is applicable. Lopez, supra, 62 N.J. at 272. The judge's determination "should ordinarily be made at a preliminary hearing" at which affidavits, depositions, and testimony may be presented. Id. at 275-76. The judge should consider all "relevant facts and circumstances" including but not limited to:

> the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. Id.

Defendants' Motion to Dismiss is denied. A Motion to Dismiss should not be granted at this time based solely on the allegations in the complaint.

This application is more appropriate for a motion for summary judgment filed after basic discovery has been conducted on the issue including, but not necessarily limited to, a deposition of the plaintiff and a review of her medical records. The court will have the advantage of this information and will probably conduct a Lopez hearing at that time.

Motion DENIED.

Carol E. Higbee

CAROL E. HIGBEE, P.J.Cv.

XXXX Order is attached.